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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

(Continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

APPELLANTS' REPLY BRIEF

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

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APPELLANTS' REPLY BRIEF

INTRODUCTION

This brief is in reply to the briefs submitted by appellees and amici on their behalf. As such, it is limited to the arguments advanced by appellees in support of the

decision below. The appellees have, however, simply not addressed some of the issues raised in the opening brief of the State. Therefore, we will respond to only those issues actually addressed by appellees, and we will discuss the other issues summarily — if at all.[1]

SUMMARY OF ARGUMENT

Jurisdictional Questions. The major jurisdictional question involves the propriety of a three-judge district court coupled with a direct appeal to this Court in accordance with 28 U.S.C. § 2281 (1970) and 28 U.S.C. § 1253 (1970). To the limited extent that this issue is addressed by the United States (which raised it originally by its Motion to Dismiss) we will show that the Solicitor General has apparently abandoned his position that a three-judge district court was not required in this case. Therefore, this case is properly before this Court on direct appeal.

Validity of the State Cigarette Tax.

In response to appellees' arguments as to the validity of the state cigarette tax with regard to on-reservation sales by Indians to non-Indians (or non-reservation Indians), we will first briefly address the repeated contention of appellees in the *Colville* case that the true incidence of the tax is on the Indian seller and, for that reason, its imposition is barred by *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Then, we will turn to the principal issue on this appeal, which is whether a state may tax *non-Indians* with respect to the use or consumption of cigarettes purchased from reservation Indian retailers under circumstances

[1]For example, in the *Yakima* case (No. 3909) neither the United States nor the Yakima Tribe addresses the issue of state taxation of Indians who are not members of the Yakima Tribe. State Br. 92-96. This issue was decided by the three-judge district court (see J.S. App. 54-55) and listed in the Questions Presented. J.S. 8. We do not discuss this issue here simply because there is no argument to rebut.

where the Tribe also imposes what it calls a tax on the sale of those cigarettes. Additional issues include state taxation of Indians who are not members of the reservation tribe (*Yakima* case only), the methods of enforcement of tribal retailers' excise tax collection responsibility and (in the *Colville* case only) the enforceability of the state motor vehicle excise tax against Indian vehicle owners.

First, by way of introduction, we will show that the essential power claimed by the Tribes is the power to immunize non-Indians from state taxation in order to establish a price incentive sufficient to attract non-Indians to the tribal "smoke shop" enterprises. To be sure, this attraction results in increased sales and increased income to the Tribes and their members. But it also results in non-Indians avoiding *their* obligation to shoulder a fair share of the State's tax burden.

With the claim of the Tribes and the United States thus brought into focus, we will next here examine the legal theories upon which that claim is based. Those theories fall into two categories, which may be described as the "tribal self-government" theory, and the "federal preemption" theory. We will take up each category in turn.

We will show that the right of tribal self-government has never been extended by this Court as far as the United States and the Tribes would extend it here. That right simply does not encompass the power to immunize non-Indians from state taxation as a means of protecting a source of tribal revenue. Rather, that right has been confined, by this Court, to the power of governing the affairs of tribal members and, as shown by *Williams v. Lee*, 358 U.S. 217 (1959), tribal jurisdiction over non-members can be justified only when necessary to immunize tribal members from state jurisdiction and thereby preserve tribal jurisdiction over those members.

Further, we will show that tribal *governmental* power is not really at stake here at all, as it was in *Williams, supra*, and in *Fisher v. District Court*, 424 U.S. 382 (1976) (tribal civil power over tribal members) and *United States*

v. Wheeler, 435 U.S. 313 (1978) (tribal criminal power over tribal members). Instead, what is at stake here is a tribal claim to a revenue source, a source which the Tribe partly exploits through what it denominates as "taxes" that are really nothing more than a businessman's mark-up.

This distinction between governmental entities acting in a truly governmental capacity and those same entities acting in a commercial capacity has long been recognized and applied by this Court with respect to States, the United States, and foreign nations. It should be recognized and applied with respect to Indian tribes as well.

The Tribes and the United States would further extend the concept of tribal self-government to build a legal wall around the reservations, immunizing from state law anyone within that wall, Indian and non-Indian alike. But any such extension of the concept is directly contrary to the decisions of this Court, as shown in *Moe*.

We will then take up the claim of federal preemption. We will first show that the District Court's reliance upon section 16 of the Indian Reorganization Act (25 U.S.C. §476 (1976)) is completely misplaced. We will then show that the Indian Commerce Clause does not, of its own force and effect, preempt state taxing power over non-Indians buying cigarettes from Indians. Any such argument, again, is contrary to this Court's decision in *Moe*.

A claim made only in *Colville* (Cause No. 3868 below) will then be taken up; *i.e.*, that the state excise taxes are discriminatory in view of the additional tribal tax on the same transaction, and are therefore violative of the Indian Commerce Clause. Though this claim purports to rely upon analogies to decisions by this Court under the Interstate Commerce Clause, we will show that it is also just so much legal bootstrapping.

The sources of the claim of *statutory* preemption will then be examined. These include the Indian Reorganization Act of 1934, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Buck Act of 1940. Far from establishing

the tribal power here claimed, those acts make it clear that, in the mind of Congress, such a power does not and should not exist.

Next, the claim of preemption by treaty provision will be examined. The key treaty provision is found in Article II of the "Stevens" Treaties which establishes reservations for the "exclusive" use and occupation of tribal members. This claim is, we will show, simply another attempt to build a legal wall around the reservation — to immunize non-Indians as well as Indians from state tax laws. And that attempt, like the similar attempt made under the Indian Commerce Clause, cannot stand after this Court's decision in *Moe*. Thus, neither the Indian Commerce Clause, nor any federal statute, nor any treaty provision, supports the claim of tribal power to immunize non-Indians from state taxes.

Finally, in responding to appellees' arguments to the contrary it is useful to emphasize that *all parties* agree the question turns on whether such state taxation (1) impermissibly interferes with tribal self-government or (2) is preempted by federal law. This was the basic analysis employed by the district court and it is well grounded in the history of this Court's decisions in the area of Indian affairs. *See Williams v. Lee*, 358 U.S. 217 (1959); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

Beyond this one area of agreement, however, appellees disagree with the State and, in some cases disagree among themselves. Therefore, we will identify, within the two sub-issues of tribal self-government and federal preemption, the major arguments of the appellees and we will also indicate (where appropriate) which appellees subscribe to particular arguments.

ARGUMENT IN RESPONSE TO APPELLEES

1. Jurisdictional Questions.

There are, it will be recalled, two jurisdictional questions presented in this case. The first involves the propriety of a three-judge federal district court coupled

with a direct appeal to this court in accordance with 28 U.S.C. §2281 (1970) and 28 U.S.C. §1253 (1970). The second relates to the timeliness of the State's appeal insofar as the district court's decision regarding the state motor vehicle excise tax is concerned. None of the appellees have submitted any arguments whatsoever on the second issue and, therefore, we merely refer the Court to our opening brief at page 49-53. As for the three-judge court jurisdictional issue, we note from the several briefs of the appellees that:

(1) The appellee Indian Tribes in *Colville* are fully supportive of the State's position that a three-judge district court was proper under the circumstances and, therefore, are opposed to the United States' motion to dismiss;

(2) The appellee Yakima Indian Nation in Cause No. 3909 below (hereinafter *"Yakima"*), although supporting the United States' motion to dismiss, has presented no arguments beyond those initially submitted by the Solicitor General in his motion (Yakima Br. 1-3); and

(3) Most importantly, the United States itself has submitted nothing further and, in fact, even seems to have abandoned its earlier position — based upon the Solicitor General's reading of footnote 17 in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976). See, in particular, the following observation in U.S. Br. 26 n. 6:

> "To this extent, it would seem that *Bryan* and *Wheeler* have qualified the suggestion in *Moe* (425 U.S. at 481 n. 17) that 'existing federal statutes,' rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters."

Thus, once again, the position of the United States on this question appears to have significantly switched.[2] If

[2]As previously observed, it was the United States which petitioned for the three-judge court in *Yakima*. State Br. 44, 45; see also A. 145. The United States switched position by filing its Motion to Dismiss which, of course, was predicated on the correctness of footnote 17 in *Moe*. See Motion to Dismiss, p. 9. The Solicitor General now suggests that footnote 17 is incorrect, thereby abandoning the grounds for the motion, though not the motion itself.

the United States contends that the Indian Commerce Clause itself is the basis for preempting state taxing power over non-Indians, it can hardly be heard to claim that a three-judge court was not properly convened in this case.[3] Rather than continue this dialogue with the Cheshire Cat, we say no more. Instead, once again, we stand on the arguments extensively presented in our opening brief at pages 32-49; those arguments remain unanswered, and this is reason enough for not repeating them.

2. Incidence of the State Cigarette Tax.

As noted above, appellees in the *Colville* case here urge that the district court, which ruled in their favor, was nevertheless wrong in one respect; *i.e.*, in agreeing with the State that the true legal incidence of the cigarette tax is on the non-Indian purchaser rather than on the Indian seller. Briefly, our response to this line of argument by those appellees is as follows:

(1) To begin with, the same contention, with the same supporting authorities, was presented to the district court and there rejected, the court saying:

> "In sum, this Court concludes the statute evidences the legislature's intent to impose the legal incidence of the tax at the earliest constitutional opportunity.

[3]Contrary to the position urged by the Solicitor General and the Tribes, it remains our position that the *Indian* Commerce Clause does not provide any "automatic exemption" from state taxation for non-Indians who purchase cigarettes from tribal retailers. This, however, does not affect the jurisdictional basis for the three-judge court below. That court, quite correctly, based its jurisdiction upon challenges to state statutes under the *Interstate* Commerce Clause. Those state statutes provide for seizure of cigarettes, including off-reservation seizures of cigarettes being shipped from outside the state to the reservations. See State Br. 41-49.

As we have also pointed out, however, there is a second basis for the court's jurisdiction. See State Br. 35-40. Although footnote 17 in *Moe* has made any claim of on-reservation tax immunity insubstantial or "frivolous" (see *Goosby v. Osser,* 409 U.S. 512, 518 (1973)) when that claim is based upon the Constitution itself, rather than upon a statute or treaty provision, it required footnote 17 to make it clear that this is indeed the case. Prior to this Court's decision in *Moe*, it was not clear. But this litigation had been commenced, and the three-judge court had been convened, prior to that decision.

> Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller." J.S. App. 23.

(2) That conclusion, in turn, is fully supported by the statutes involved. RCW 82.24.080, as amended in 1972, provides that:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. * * *
>
> "It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place *of the first taxable event occurring within this state.* * * *" Br. App. 24a (Emphasis supplied).

And RCW 82.24.260, as amended in 1975, provides that:

> "Any retailer who sells or otherwise disposes of any unstamped cigarettes other than * * * a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020 * * * ." Br. App. 26a (Emphasis supplied).

This 1975 amendment, notably, was adopted by the legislature *after* the Washington Supreme Court decisions in *Makah Indian Tribe v. State Tax Commission*, 72 Wn.2d 613, 434 P.2d 580 (1967), and *Canteen Service, Inc. v. State*, 83 Wn.2d 761, 522 P.2d 847 (1974),[4] and explicitly confirmed the state court's ruling in *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974),[5] that in the case

[4]Cited by appellees, Colville Br. 121.

[5]Upon which the district court relied and in which the state court said:

> "[I]t would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian, at which time Mr. Tonasket [the tribal retailer] could be required to affix the tax stamp and collect the amount of the tax from the non-Indian customer." 84 Wn.2d at 181, 525 P.2d at 754.

of a sale of cigarettes by a non-taxable Indian to a taxable non-Indian, the incidence of the cigarette tax is upon the non-Indian.

(3) The reason for the district court's decision, characterizing the legal incidence of the tax as falling "* * * upon the non-Indian purchaser rather than the tribal seller * * *," in turn, is that under this Court's ruling in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the only earlier possible taxable event listed in RCW 82.24.080, *supra*, *i.e.*, the sale, is immune from taxation when the seller is an Indian or Indian tribal retailer.

(4) And finally, no unconstitutional discrimination results from this classification, *i.e.*, non-Indian purchasers from Indians, because as a matter of economic reality it is the purchaser who bears the real burden of the tax whether he buys his cigarettes from a tribal smoke shop (and thus pays the tax himself) or from his neighborhood supermarket where he pays a price which undoubtedly includes a mark-up reflecting the seller's tax obligations. *Accord*, appellees' own brief in *Colville* at p. 110.[6]

3. Validity of the Tax as Applied to Non-Indian Purchasers.

(a) Introduction.

First, by way of introduction, let us delineate the tribal power which is here being claimed.

The key to understanding that claim is found in some very simple facts of business economics. Clearly, a vast

[6]And *accord*, as well, *United States v. County of Fresno*, 429 U.S. 452 at 464-65 (1977). In fact, if there is any real discrimination, it is against the individual who buys from the supermarket rather than from the Indian smoke shop, for his retail sales tax obligation under RCW 82.08.020, (St. Br. App. 19a) will be based on a seller's purchase price which includes this cigarette tax mark-up, unlike the purchaser of cigarettes from an Indian outlet.

majority of the cigarette sales by the thirty-eight smoke shops involved in this litigation are made to non-Indians. Those smoke shops, however, suffer from a disadvantage in attracting their non-Indian customers. That disadvantage stems from the location of the shops. Simply stated, it takes more time, effort, and gasoline for these non-Indians to go out on the reservation where the smoke shops are located than it takes for them to go to the local supermarket. And hence, the smoke shops will lose their non-Indian customers to the local supermarket unless they can offer a substantial price incentive to compensate their customers for the extra time, effort, and gasoline required to go out to the reservation. The greater the distance, of course, the greater must be the price incentive. On the Yakima reservation, for example, it ranges from $1.20 to $1.40 per carton, depending on the precise location of the smoke shop. (See deposition of Dr. Herrman, quoted at State Br. 19, 20.)

The basic claim of the United States and the Tribes is that this price incentive must come out of the State's pocket — and the majority of the district court so held. The State is to be required to make up for the locational disadvantage of the smoke shops by foregoing its cigarette tax of $1.60 per carton and its sales tax of 5%.[7] For only if the State is prevented from collecting these taxes can the smoke shop operator provide the necessary price incentive to retain his non-Indian customers. Moreover, because the State's tax loss, per carton, would usually be greater than the necessary price incentive, the smoke shop operator would be allowed to keep, as additional profit, at least part of this difference.[8] Thus, both the volume of business and the profit margin per unit of volume could remain high. It is a very nice arrangement — except for the State.

[7]This sales tax would add another $.25, approximately, to the sales price.

[8]The less the required price incentive, of course, the greater the available profit.

The Tribes, not surprisingly, wish to garner some of this profit for the tribal coffers. They would do this through their tobacco ordinances, which lay claim to some of this profit in two ways. First, the ordinances establish the Tribes themselves as the sole source of supply for the smoke shops, thereby allowing the Tribes to take a wholesaler's mark-up. Secondly, the ordinances impose a tax — or more precisely, what they denominate a tax — upon the cigarette business.[9]

It is this tribal "tax" which provides the legal underpinning[10] for the Tribes' claim of immunity from state taxation for their non-Indian customers. Without that tribal tax, this Court's decision in *Moe, supra*, would clearly be applicable. But as a result, the non-Indian customers would lose their immunity from state taxation. And as a consequence of their customers' loss of that immunity, the smoke shop operators would have to forego either their profit margins, or their price incentives to the non-Indians, or perhaps even both. The volume of cigarette sales to non-Indians would accordingly diminish, perhaps disappearing entirely, and with it the tribal "tax" base.

Such a result, say the United States and the Tribes, is contrary to federal law. If the Tribes enact a tax which is dependent upon the volume of business done with non-Indians, the State can do nothing to diminish that volume and thereby diminish the tax base.[11] They would thus have this Court view the imposition of the state cigarette and sales tax upon the non-Indians as the

[9]In the case of the Yakima ordinance, the tax is nominally upon the Indian retailer. In the case of the Colville, Lummi and Makah ordinances, it is nominally upon the buyer. For purposes of analysis of the Tribes' basic claim, however, this difference is irrelevant.

[10]Or more accurately, "bootstrapping".

[11]Including, logically, the repeal of the State's own taxing scheme statewide, for that would have precisely the same effect. If the State did not impose its taxes on the sale of cigarettes there would likewise be no incentive to its non-Indian residents to go out and buy their cigarettes from the tribal outlets.

functional and legal equivalent of a state law expressly prohibiting the tribal tax, or expressly prohibiting the cigarette enterprise entirely.

But viewing the state taxes in this manner would be incorrect. Such a view overlooks completely the business realities. The State, in essence, is telling the Tribes that they may sell all the cigarettes they wish, to Indians and non-Indians alike. And the Tribes may impose any mark-up they wish, and may even impose taxes upon the cigarette business, at any rate they wish.

If, however, this business is conducted at a location somewhere on the reservation, where a substantial price advantage is necessary to overcome that locational disadvantage, that is the Tribes' problem and not the State's. Federal law, we submit, does not require the State to refrain from imposing its taxes in order to make up for the Tribes' competitive disadvantage stemming from their smoke shops' poor locations. As entrepreneurs, the smoke shop operators may very well suffer from a business disability by reason of these poor locations. But the State has no obligation under federal law to compensate for this disability by foregoing its tax on non-Indians.

Yet the District Court imposed precisely that obligation upon the State. And the inequitable — indeed, absurd — consequence of this action by the District Court should not go unnoticed. Non-Indians avoid the burden of state taxes used to provide state services for those same non-Indians — and for Indians as well. Moreover, this benefit of tax immunity is conferred upon these non-Indians very selectively. The majority of cigarett purchasers still live far enough away from Indian reservations that the price incentive offered by the smoke shops does not compensate them for the time and expenses needed to drive from Seattle, for example, or Spokane, to the nearest Indian smoke shop.[12] They still buy their cigarettes at the local supermarket.

[12]We deliberately omit Tacoma, which is adjacent to, and indeed partly included within, the Puyallup Reservation.

And thus, the bulk of the benefit resulting from the State's tax loss flows to a select, albeit substantial, group of non-Indians, and not to the reservation Indians themselves.[13]

(b) **Interference with Tribal Self-government.**

All of the appellees argue that state taxation of non-Indians engaged in economic transactions with reservation Indians impermissibly interferes with the "right of tribal self-government", citing *Williams v. Lee, supra*. Building from the premise that Tribes have the power to tax in order to raise revenues for the support of tribal government, the appellees argue that Indian tribes have a concomitant right to immunize even non-Indians from state taxation in order to maximize tribal tax revenues. For example, the United States contends:

> "* * * the State taxes strike deeply at the tribe's capacity to raise essential governmental revenues. All government, of course, costs money, and independent government requires independent revenues. Like most tribes, the Yakima Nation cannot raise the funds necessary to carry on effective government *without tribally operated or licensed enterprises that cater primarily to non-Indians, and the economic viability of most such businesses depends upon at least some exemption from State taxes.*
>
> "The immunity which members enjoy in their dealings with each other is of little help in providing tribal revenues. Tribal self-sufficiency can be achieved only by trade, or other transactions, *with more affluent non-Indian neighbors*, including those residing on the Reservation." (Emphasis supplied.) U.S. Br. 24.

In the same vein, the Colville Tribe claims:

> "* * * if the states can superimpose their taxes on tribal taxes that are enacted, any business taking

[13]For this reason, viewed as a system for sharing state revenues with the Tribes or their members, a more inefficient and absurd system would be difficult to devise.

place on the reservation will bear a total tax burden greater than off the reservation, and a strong incentive will be provided for non-Indians to do business elsewhere. From the Tribes' perspective, therefore, there can be no peaceful coexistence between state and tribal taxation of on-reservation transactions between Indians and non-Indians; imposition of state taxes will preempt the Tribes' practical, if not legal, ability to tax. *If the Tribes are ever to achieve economic self-sufficiency, attraction of non-Indian business to the reservations is essential.* In light of the stipulated facts and these practical realities, the Appellee Tribes believe it indisputable that imposition of the state tax will substantially interfere with tribal self-government." (Emphasis supplied.) Colville Br. 58-59.

These claims, however, are nothing more than an extension of the district court's determination that the State's taxation of non-Indians interfered with the right of tribal self-government because it deprived the Tribes of a revenue source "* * * needed for tribally sponsored programs." J.S. App. 37.

In order to demonstrate the error of the appellees' argument it is necessary to examine what they say about the source of this right of tribal self-government, the nature of the right, and the ways in which the interference with this right supposedly occurs. Contrary to the assertions of the appellees, this examination shows that the right of tribal self-government is limited to the control of the affairs of members of the Tribe and does not extend to the conferring of tax immunities upon non-Indians.

First, as the United States correctly points out, the source of the right of tribal self-government is the:

> "* * * residuum of aboriginal independence, not the consequence of any 'delegation to them of federal authority.'" U.S. Br. 16.

However, it should also be pointed out that with the conquest of the continent and the Court's retreat from *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the retained sovereignty of Indian tribes has been limited to

governing their own members. As recently stated by this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978):

> "'[T]he limitation upon [Indian tribes'] sovereignty amounts *to the right of governing every person within their limits except themselves.*' Fletcher v. Peck, 6 Cranch. 87, 147, 3 L Ed 162 (1810) (emphasis added)."

Next, the appellee Tribes argue that the nature of the right of tribal self-government includes the *exclusive right* to prohibit or regulate the activities of non-Indians within the boundaries of the reservation (U.S. Br. 19-21; Yakima Br. 30-37), or at least to regulate by taxation the activities of non-Indians engaged in transactions with Indians (Colville Br. 34-39). Those appellees, as did the district court, rely principally upon *Williams v. Lee, supra*. However, as shown in the State's opening brief at 66-67, *Williams* subjects non-Indians to tribal jurisdiction purely as an *adjunct* to a tribe's jurisdiction over its own members. Here, on the other hand, the State is not seeking to subject tribal members to state taxation; only non-Indians. Thus, *Williams v. Lee* is inapplicable.[14]

Certainly, if the right of "tribal self-government" goes only to the right to govern the affairs of tribal members, the nature of that right cannot be extended to immunize non-Indians from state law, especially in circumstances where it is the non-Indian who reaps the benefit of the immunization. Neither the source of that right — aboriginal sovereignty — nor the nature of the right counsels otherwise. Nevertheless, as previously indicated, the appellees argue that state taxation *of non-Indians* interferes with the right of tribal self-government because it deprives the Tribe of the ability to attract non-Indian

[14]Similarly, the appellees' reliance upon *United States v. Mazurie*, 419 U.S. 544 (1975), is misplaced. That case did not involve the exercise of the tribal right of self-government. Rather, this Court there held that the tribe, in passing an ordinance requiring the licensing of liquor outlets on the reservation, was exercising a power *delegated* to it by the United States.

business to the reservation to serve as a revenue source for tribal programs. Initially, we suggest that this claim is one more properly addressed to Congress than to this Court. If, as a matter of policy, Congress wishes to provide tax exemptions for non-Indians dealing with reservation Indians in order to bolster tribal revenues or economic self-sufficiency, it arguably has the power to do so by affirmative legislation.[15]

Beyond this, however, the claim of the appellees reveals that tribal *governmental power* is not really at stake here at all. Rather, what is at stake is the entitlement of the Tribes to a certain revenue source — but a revenue source which they claim essentially as entrepreneurs, rather than as governments. As the district court found, it is strictly the *"competitive advantage"* enjoyed by the Tribes which results in tax revenues to the Tribe. *See* J.S. App. 7-8, 49-50. Thus, in effect, the Tribes would wrap their proprietary activities in the mantle of governmental power for the purpose of basing their arguments on a concept of tribal self-government.[16]

The entrepreneurial nature of the Tribes' claim is further shown by the nature of the "tax" levied by the Tribes. A true tax is a forced exaction by the government.

[15]We say "arguably" because of an obvious equal protection problem. In *Moe*, this Court rejected Montana's argument that immunity of Indians from state taxation constituted an invidious discrimination against non-Indians on the basis of race. In so doing, the Court applied the test formulated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974):

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 425 U.S. at 480.

As held in *Moe*, a tax immunity for Indians certainly meets this test of rationality. But it is less clear that a conferral of immunity upon non-Indians, simply because they purchase cigarettes from Indians, would likewise meet this test. This question, however, need not be resolved here because, as we will show later, Congress has not, to date, conferred any such immunity.

[16]Appellees observe that the tribal ordinances in question are not merely revenue-raising devices, but also comprehensive regulatory schemes for the sale of cigarettes on the Tribes' reservations. But the appellees nowhere claim that state law conflicts with any substantive aspect of the Tribes' "regulatory schemes".

If the tax is not paid, the government imposing it collects by forcibly taking the taxpayer's property, or by putting him in jail, or both. But here, the charges imposed by the Tribes as applied to non-Indians are not a tax at all; instead, they are simply a form of "mark-up".

Thus, in the *Yakima* case, the tribal "tax" (termed an "administrative fee") is imposed on Indian retailers. The Tribe has established itself as the sole wholesaler for the retailers, and collects the tax *from the retailer* upon the sale of cigarettes to a non-Indian. The non-Indian bears the economic burden, to be sure, but as to him, the Tribe is not imposing a "tax".

Similarly, the charge involved in the *Colville* case, even though ostensibly levied upon the non-Indian purchaser, is a tax in name only. In effect, it is just another form of a mark-up by the entrepreneur selling the cigarettes. As explained in the brief of the *Colville* Tribes:

> "The contacts between the non-Indians and the tribal businesses are entirely consensual and no non-Indian taxpayers have challenged the validity of the tribal tax. Further, because of the structure of the tribal taxes, the taxes are included in the purchase price of the goods sold and are automatically remitted by the taxpayer upon purchase. The Tribes therefore need not resort to either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax."[17] Colville Br. 20.

[17]In *Colville*, the Tribes discuss at length the question of whether, under *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), a tribe may impose a tax upon non-Indians. (Colville Br. 32-49). We have already suggested that this question need not be decided in these proceedings (State Br. 60 and 61, notes 43 and 44). The Tribe's description of how its tax actually works, as quoted above, provides an additional reason for not deciding that question here. If there is never a need to resort to "either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax", and if, instead, the "tax" is enforced solely by the refusal to sell cigarettes to the non-Indian who is unwilling to pay the "tax" part of the selling price, then we are really not dealing with a tax at all. A supermarket chain could do exactly what the Tribes are doing here, by calling part of their mark-up a "tax", and refusing to sell to anyone who is unwilling to pay it. The important question of whether *Oliphant* prohibits tribal imposition of a tax on non-Indians should therefore be reserved for resolution in a case in which a true tax is involved.

This court has many times noted a distinction between governments acting in a sovereign capacity and governments acting in a private or commercial capacity. As summarized in *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682 (1976):

> "Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach. As the Court stated through Mr. Chief Justice Marshall long ago in *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824):
>
> > 'It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.'

Cf. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549, 567-568 (1922). In this same tradition, *South Carolina* v. *United States*, 199 U.S. 437 (1905), drew a line for purposes of tax immunity between the historically recognized governmental functions of a State and businesses engaged in by a State of the kind which theretofore had been pursued by private enterprise. Similarly, in *Ohio* v. *Helvering*, 292 U.S. 360, 369 (1934), the Court said: 'If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function * * * * When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader * * * .' It is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader * * * .' *New York* v. *United States*, 326 U. S. 572, 579 (1946). See also *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 189-190 (1964); *California* v. *Taylor*, 353 U. S. 553, 564 (1957); *United States* v. *California*, 297 U. S. 175, 183 (1936)." 425 U.S. at 695-96.

The Tribes are here entering the marketplace as *traders*, and they are demanding that the State forego its taxes upon non-Indians in order to insulate them, as traders, from the effect of competition from other traders, such as local supermarkets. Yet the Tribes would have this Court view their commercial activity as an exercise in *self-government*, on the same legal plane as the operation of a judicial system for their own members (*cf. Williams v. Lee, supra*, and *Fisher v. District Court*, 424 U.S. 382 (1976)), or the operation of a criminal justice system for their own members (*cf. United States v. Wheeler*, 435 U.S. 313 (1978)). But as *Dunhill, supra*, and the cases therein cited show, this Court has never blurred this fundamental distinction in the case of States, foreign nations, and the United States itself. It should not do so now in the case of Indian tribes.

Finally, under this heading, mention should be made of the argument of the United States and Yakimas (but not Colvilles) that state taxation of non-Indians purchasing cigarettes from reservation retailers somehow infringes upon the territorial integrity of the Tribes' reservations. Insofar as this argument lends itself to comprehension, these appellees appear to be claiming that a state loses jurisdiction of its non-Indian citizens when they step upon an Indian reservation or at least on trust or restricted status land. But that has never been the view of this Court. *See, e.g., Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898). And, to the extent that the argument suggests that the State lacks jurisdiction as a matter of due process to require reservation retailers to collect the tax, that contention, as recognized by the district court, is fully answered by this Court's decision in *Moe*. As stated by the district court:

"In *Moe*, the Court neither mentioned the nexus

requirement nor did it give any special significance to the fact that the Indian retailer secured his inventory from an in-state wholesaler. This was undoubtedly because of the substantial presence of the Indian retailer in the state. After all, the reservation exists within the territorial boundaries of the State. Indians are citizens of the State and are entitled to and do receive services from it. Although this is not sufficient to justify direct state taxation of Indians or Indian tribes in the face of conflicting treaties and/or federal statutes, it clearly constitutes a sufficient link so that the mere imposition of a collection requirement does not violate due process." J.S. App. 27.

Certainly, if the collection requirement, as applied to Indians, does not violate due process, a tax on the State's non-Indian residents does not do so either.

Summary:

For the foregoing reasons, the appellees' arguments on interference with tribal self-government are all unpersuasive. The right of tribal self-government does not include the right to immunize non-Indians from state taxation. Furthermore, the Tribes, in engaging in the business of retailing cigarettes to non-Indians, are simply not exercising a power of self-government; rather, they are engaged in ordinary commercial transactions which are not entitled to the special protections inherent in sovereignty. Finally, state taxation of non-Indians purchasing cigarettes from reservation retailers in no way infringes upon the Tribes' territorial sovereignty over their reservations.

(c) **Federal Preemption.**

In addition to their claims of interference with the right of tribal self-government, the appellees contend that state taxing power over non-Indians purchasing cigarettes from reservation retailers has been federally preempted. With differing degrees of emphasis the appellees claim this federal preemption stems (a) from the Indian Commerce Clause, of its own force and effect, and (b) from treaties

and federal statutes encouraging tribal self-government and economic development.

Before responding directly to this series of arguments, however, it bears emphasizing that *no appellee* here attempts to support the finding of the district court that the Tribes are exercising federal powers — delegated to the Tribes under Section 16 of the Indian Reorganization Act (25 U.S.C. §476 (1976)) — in taxing non-Indians. Undoubtedly, appellees recognize that this Court's decisions in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *supra*, and *United States v. Wheeler*, 435 U.S. 313 (1978), *supra*, foreclose any argument that Section 16 of the IRA *delegates* any federal power to Indian tribes.[18] But the district court's determination that the Tribes were exercising federally delegated power was crucial to its finding of federal preemption. In fact, it will be recalled that the district court rejected the arguments of federal preemption based upon the Indian Commerce Clause and upon statutes, such as the IRA, generally encouraging tribal self-government and economic development. Logically, therefore, the only remaining basis for federal preemption would have been federal delegation. Thus, the failure of appellees to argue (let alone demonstrate) that the district court was correct in its determination that the Tribes were exercising federally delegated powers completely undermines this basis for the district court's decision.

(i) **The Indian Commerce Clause, of its own Force and Effect, is not a Sufficient Basis for Preempting State Taxing Power over non-Indians Purchasing Cigarettes from Tribal Retailers.**

Appellees United States and *Colville* Tribes principally now argue that the Indian Commerce Clause, of its

[18] *Oliphant* and *Wheeler* were decided subsequent to the issuance of the district court's opinion. However, the State raised this point in its motion for reconsideration, citing *Oliphant* and *Wheeler*. See Motion for Partial New Trial, J.S. App. 75.

own force and effect, preempts state taxing power over non-Indian citizens engaged in economic transactions with reservation Indians where the Tribe itself taxes these transactions. According to the United States:

> "The analysis is simply that the Constitution itself — as exemplified in the Indian Commerce Clause — ousts State jurisdiction over all matters within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation." U.S. Br. 25.[19]

Precisely this same "analysis" was presented to this Court over eighty years ago, in *Thomas v. Gay*, 169 U.S. 264 (1898), in precisely the same context as here, *i.e.*, in determining the taxability of non-Indians doing business with Indians.

> "It is claimed that the legislative assembly of the territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians, because, both before and since the creation of said territory, *exclusive jurisdiction over said Indians and their lands, and over all matters in any way affecting them, or in which they are interested, is in the United States.*" 169 U.S. at 268 (emphasis supplied).

In rejecting this argument, the Court stated:

> "The unlimited power to Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power. * * *" 169 U.S. at 274-75.

The recent decisions of this Court have gone even

[19]Similarly, in the *Colville* case, the Tribes argue:

"[T]he [Indian Commerce] Clause was designed to federalize the political and economic relations with the *tribes*, to the exclusion of the states. A state tax assessed on commerce with the tribal enterprises, which directly impairs the government of the reservations, is therefore prohibited." Colville Br. 68 (emphasis in original).

further than *Thomas v. Gay* in one important respect. They have established that *even for Indians* the Constitution itself provides no automatic tax immunities. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). As summarized in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976):

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and not any *automatic exemptions* 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine. * * *" 425 U.S. at 481, n. 17 (emphasis supplied).

The district court therefore summarily rejected appellees' Indian Commerce Clause arguments saying, on the basis of footnote 17 in *Moe, supra*:

> "[A] full review of [the tribes'arguments] is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court." J.S. App. 24.

The United States now seeks to escape the impact of this Court's ruling in *Moe, supra*, by suggesting that the Court's later decisions in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *United States v. Wheeler*, 435 U.S. 313 (1978), have:

> "* * * qualified the suggestion in *Moe* (425 U.S. at 481 n. 17) that 'existing federal statutes,' rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters." U.S. Br. 26, n. 6.

This bold assertion, unsupported by any analysis, is patently incorrect. It amounts to nothing more than an exhortation to this Court to return to the approach of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Nothing in *Bryan* or *Wheeler* suggests that the Indian Commerce Clause, of its own force and effect, constitutes an

"automatic exemption" for tribal Indians from state law. Even conceding that this clause *does* serve as a basis for exempting *reservation Indians* from state taxation, that principle cannot be extended so as also to exempt *non-Indians* from state taxation. Nothing in the history of this Court's decisions in the area of Indian affairs suggests otherwise.

The *Colville* Tribes, on the other hand, would distinguish *Moe* on this count (*i.e.*, the applicability of the Indian Commerce Clause) because that case dealt only with the issue of state taxation of reservation Indians and did not involve an interference with "tribal self-government":

> "The issue before the Court in *Moe* was the validity of the state sales tax, as applied to on-reservation sales by Indians to Indians.' 425 U.S. at 480. Both *McClanahan* and *Mescalero Apache*, relied upon by the Court for its statement that there was no 'automatic exemption' under the Indian Commerce Clause, also dealt with imposition of state taxation on reservation Indians. Neither *Moe*, *McClanahan* nor *Mescalero* involved any interference with tribal self-government nor any discrimination against Indian commerce." Colville Br. 88-89.

The *Colville* Tribes are also in error. In the first place, *Moe* also involved the imposition of state cigarette taxes upon non-Indians purchasing cigarettes from reservation retailers coupled with a claim of interference with tribal self-government (in terms of subjecting reservation retailers to state tax collection responsibility). *McClanahan*, too, involved a claim of interference with tribal self-government. In response to Arizona's contention that a state income tax imposed upon an individual Indian did not infringe upon the right of tribal self-government, this Court there said:

> "In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." 411 U.S. at 179.

Then, noting that the *Williams v. Lee* test of infringement with tribal self-government was designed to protect individual Indians, as well as tribes, the Court struck down the tax because it infringed upon the self-governing rights of individual Indians. *See* 411 U.S. at 181.

(ii) The Indian Commerce Clause, in the Absence of Federal Legislation, does not Prohibit States from Imposing Taxes on non-Indians Purchasing Cigarettes from Tribal Retailers, even where the Tribe Imposes a Tax on the Same Transaction.

We have just, in effect, dealt with one aspect of this argument, *i.e.*, that even if the Indian Commerce Clause does not afford any *automatic exemptions* to the tribes (*Moe*) it somehow works to immunize non-Indians dealing with reservation Indians from state taxation where, because the tribes are taxing the same transaction, an interference with tribal self-government is claimed. The Colville Tribe further argues, however, that where the Indians are taxing the same transaction, the Indian Commerce Clause also has an impact like that of the Interstate Commerce Clause, U.S. Constitution, Art. I, §8, cl. 3, so as to bar the imposition of "multiple burdens" on Indian commerce. Colville Br. 108-116.

Again, although ruling for the Tribes the district court rejected this same argument, stating that:

> "The cases on which the Tribes rely for support have established a doctrine of 'constitutional law' based upon a construction of the scope and effect of the Commerce Clause in the absence of controlling federal statutes." J.S. App. 24 (citations omitted).

And in noting that this Court in *Moe*, *Mescalero* and *McClanahan* had established the principle that the Indian Commerce Clause provides no "automatic exemption" from state taxation, the district court thus implicitly recognized that the proper analysis involves a search for

federal preemption in the applicable treaties and statutes defining the limits of federal, state and tribal power over Indian reservations.

To this extent, the Tribes' attempt to analogize to the Interstate Commerce Clause is nothing more than an attempt to avoid the result compelled by adherence to the principles established in *Moe, Mescalero* and *McClanahan*. In effect, the Tribes would ask this Court to reject the modern cases and return once again to the analysis of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). For this reason alone, the Tribes' arguments should be rejected. However, we submit that there are additional reasons for not adopting the Tribes' arguments.

First, as earlier argued by the Colville Tribe itself (Colville Br. 83) the Indian Commerce Clause has a "completely different focus" from the Interstate Commerce Clause. According to the Tribe at that prior point in its brief, the Interstate Commerce Clause focuses upon the economic relationships among the states whereas the Indian Commerce Clause focuses upon political relationships between the tribes, states and the federal government.

Second, the result reached by the Tribe in employing the "multiple burdens" analysis to transactions between Indians and non-Indians is inconsistent with a rational resolution of the competing interests involved. The "multiple burdens", if any, on Indian commerce result from the imposition of a tax on the transaction by *two* taxing authorities — the Tribe on whose reservation the sale is made, and the State in whose territory the "use" or "consumption" takes place. It is not caused by the State's tax alone. Also, it must be remembered that the State has jurisdiction as a matter of due process to tax its non-Indian citizens with respect to transactions and property within an Indian reservation because Indian reservations are within the territorial jurisdiction of the State. *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898).

Thus, the Tribes' argument under the Indian Commerce Clause to the extent it relies upon an analogy to the Interstate Commerce Clause, presents this Court with a "Hobson's Choice". Given that both the State and the Tribe have jurisdiction to impose a tax upon separate aspects of a related transaction, which tax — if either — must fall? The alternatives are that neither the State nor the Tribe may impose its tax or that both may impose a tax. A "multiple burdens" analysis provides no clue to unlocking this puzzle, primarily because it deals with situations involving the exercise of taxing authority by two or more separate — *in a territorial sense* — jurisdictions.

Moreover, in employing the "multiple burdens" analysis to urge that it is the State's tax which must fall, the Tribe ignores the fact that the purposes of the Interstate Commerce Clause do not include exempting those engaged in interstate commerce from their fair share of a state's tax burden, even though it increases the cost of doing business. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Complete Auto Transit, Inc. v Brady*, 430 U.S. 274 (1977). Nothing in the history of the Interstate Commerce Clause — or for that matter, the Foreign Commerce Clause or the Import-Export Clause — requires a state to *subsidize* commerce carried on within its borders. *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

Yet this is precisely the position contended for by the Tribes. In effect, the Tribes argue that the Indian Commerce Clause — by analogy to the Interstate Commerce Clause — requires the State to subsidize Indian commerce. Because the Interstate Commerce Clause contains no such requirement, and because the Tribes have utterly failed to demonstrate that the Indian Commerce Clause does contain such a requirement, the analogy completely fails.

Finally, both the *Colville* Tribes and the United States suggest that, at a minimum, the State must give a

"credit" for taxes paid to the Indian tribes. (Colville Br. 113; U.S. Br. 23). We, however, simply fail to understand the basis for this suggestion for it only serves to obscure the true nature of the tribal claim and the legal theory on which that claim is based.

As we have already shown, the Tribes need a competitive advantage in attracting their non-Indian customers in order to compensate for the locational disadvantage of their smoke shops. That competitive advantage must be given in the form of a substantial price incentive to those customers. But that price incentive can be given only if the State foregoes completely its excise taxes on the sales of cigarettes to those customers. If, instead, the State merely gave a credit for the tribal tax, the necessary price incentive would not be given and the competitive advantage would thereby be eliminated. And, under the reasoning of the district court, and that of the appellees as well, such a result would be impermissible. For the tribal revenue, be it in the form of mark-up or "tax", would still dry up, even with the credit for a tribal tax. The essence of the tribal claim is thus truly that the State must forego its taxes completely, and not just give a credit.

(iii) No Treaties or Federal Statutes Implement an Overriding Federal Policy Requiring Freedom from State Taxation for non-Indians Purchasing Cigarettes from Reservation Retailers.

Next, appellees argue that the State's power to tax non-Indians has been federally preempted by the passage of tribal ordinances "[implementing] an overriding federal policy. *Fisher* [*v. District Court*, 424 U.S. 381 (1976)]" U.S. Br. 26-27; Colville Br. 91-107. This overriding federal policy is characterized by the United States as:

> "Encouraging the tribes to regain a measure of political and economic independence, free of undue interference by outside authority." U.S. Br. 31.

The appellees again are in error. None of the treaties or statutes which they have cited implements an "overriding federal policy" which requires exemption from state taxation for non-Indians purchasing cigarettes from reservation retailers.

At the outset, it should again be emphasized that the appellees do not claim any direct conflict between federal and state law.[20] Rather, they ask this Court to *imply* an exemption from state taxation for non-Indians. But as this Court has noted many times, in the absence of clear statutory guidance a tax exemption, including a tax exemption for Indians, will not be granted by implication. *Choteau v. Burnet*, 283 U.S. 691 (1931); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Moreover, we are not here even dealing with a tax exemption for Indians; rather we are dealing with a claimed tax exemption for non-Indians. In the absence of some definitely expressed exemption by Congress there is no reason for this Court to *imply* such an exemption.

The appellees rely principally upon the Indian Reorganization Act of 1934, 25 U.S.C. §461 (1976), *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976), *et seq.*[21] Most assuredly, these acts were designed to revitalize tribal self-government and foster tribal economic development. However, as noted by the district court:

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[20] "There is no claim here of an explicit direct conflict between federal and State law. The immediate confrontation is with a tribal ordinance." U.S. Br. 26.

[21] In *Colville*, the Tribes also rely upon the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* This reliance, however, is completely misplaced for the reason pointed out by this Court in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). The Indian Traders Act is a:

> "* * * statutory plan [which] Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691.

The purpose of that Act, in short, is to protect Indian purchasers from price-gouging, not to protect non-Indian purchasers from state tax collectors. *See Moe, supra*, 425 U.S. at 482.

"[T]he Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes *or those dealing with Indian tribes.*" J.S. App. 30 (emphasis supplied).

Indeed, in *Mescalero Apache Tribe v. Jones, supra,* this Court refused to imply from section 5 of the Indian Reorganization Act (25 U.S.C. §465) a tax immunity for even a tribal enterprise engaged in business off the reservation. The Court noted that the provisions of the IRA were designed:

"* * * to encourage tribal enterprises 'to enter the white world on a footing of equal competition.' 78 Cong. Rec. 11732. In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to." 411 U.S. at 157.

If Congress wished to reverse its policy of encouraging tribal enterprise "to enter the white world on a footing of equal competition", it would have done so in clear and unmistakable language.[22]

Indeed, rather than focusing upon such acts as the Indian Financing Act of 1974, *supra,* or the Indian

[22]The American Indian Policy Review Commission apparently agrees with us on this point. It *has recommended* that:

"* * * Congress enact legislation which provides that where an Indian tribal government enacts a tax in furtherance of Federal-Indian policy designed to enhance the tribes' self-governing capacity or to protect or foster tribal economic development of Indian people or the tribe, such tax will have the effect of preempting any competing State tax which would be applicable to the same person or activity." 1 Final Report of the American Indian Policy Review Commission, at 182 (1977).

In effect, the Tribes and the United States contend that this recommendation has *already* been adopted by Congress, although they are not quite certain as to when or where Congress did so. Further, they contend, in essence, that this same recommendation has been adopted *as part of the Constitution itself,* and that congressional adoption of this policy is really unnecessary.

The American Indian Policy Review Commission is correct in suggesting that if its recommended policy is to become federal law, congressional action is now needed; for as yet, it is not federal law at all.

Self-Determination and Education Assistance Act of 1975, *supra,* neither of which has anything to do with state taxes, it is more instructive, we believe, to focus upon acts of Congress which *do* in fact explicitly address questions of state taxing power over Indians and Indian reservations. And the implication to be drawn from those acts is very clear: Congress has never created or attempted to preserve any tax immunity *for non-Indians* on Indian reservations. It has always assumed that no such immunity exists and that it should continue not to exist.

The first act is one relied on heavily by the Yakima Tribe (although not by the other Tribes or the United States), the Buck Act, 4 U.S.C. § 104 (1976), *et seq.* (Yakima Br. 28-29). In *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), this Court found in that act a Congressional intent to preempt state power to impose taxes *upon reservation Indians,* saying:

"Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 USC §§ 104 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106(a) of Title 4 USC grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that '[n]othing in sections 105 [authorizing state sales and other excise taxes on federal reservations] and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S Rep No 1625, 76th Cong, 3d Sess, 2, 4 (1940); 84 Cong Rec 10685, and this Court has so interpreted it. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 US, at 691 n 18, 14 L Ed 2d 165. While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation

> Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event." 411 U.S. at 176-77.

In striking contrast with Section 109, which excludes only the "levy and collection" of any tax on or from any *Indian*, however, Congress showed in the Buck Act absolutely no concern about creating or "jealously protecting" any immunity from taxation for *non-Indians* doing business on Indian reservations. The obvious assumption was that they were taxable, and should remain so.

This same assumption will be found in the second act to be examined, Pub. L. 83-280, 67 Stat. 588, ch. 505 (1953). Section 4(b) of that Act embodies essentially the same policy as that in Section 109 of the Buck Act and reads, in pertinent part, as follows:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;" (emphasis supplied).

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court construed that language as follows:

> "Indeed, § 4(b) in its entirety may be read as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians. We agree with the Court of Appeals for the Ninth Circuit that § 4(b) 'is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment.' " 426 U.S. at 391.

But if the law relating to "the existing reservation Indian-Federal Government relationship", prior to the enactment of Pub. L. 83-280, conferred some sort of tax

immunity *upon non-Indians* doing business with Indians, as well as Indians themselves, why did not Congress preserve that non-Indian immunity as well? Again, the assumption by Congress was that no such immunity existed, and that was to continue to be the law after passage of Pub. L. 83-280.

Thirdly, holding in *Bryan* that Pub. L. 83-280 did not remove any immunity from state taxation for reservation Indians, this Court also contrasted Pub. L. 83-280 with various termination acts passed by the same Congress as had passed Pub. L. 83-280. Those acts did remove the immunity expressly, thus showing that Congress would likewise have done so expressly in Pub. L. 83-280 as well, had that been its intention. These termination acts are relevant here as well. They are described in *Bryan* as follows:

> "These termination enactments provide expressly for subjecting distributed property 'and any income derived therefrom by the individual, corporation, or other legal entity * * * to the same taxes, State and Federal, as in the case of non-Indians,' 25 U.S.C. §§ 564j, 749, 898, and provide that 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' 25 U.S.C. §§ 564q, 757, 899; cf. 25 U.S.C. § 726." 426 U.S. at 389-90.

If, along with tax immunity for Indians, there also existed tax immunity for non-Indians, why was that not also expressly removed in the termination acts? The answer is simple: the non-Indian immunity never existed, and there was accordingly no need for Congress even to mention it.

Congressional assumptions, and congressional intent implicit in those assumptions, are seldom bright and clear in the field of Indian law. But in the Buck Act, in Pub. L. 83-280, and in the termination acts contemporaneous with

Pub. L. 83-280, we find an exception to this general rule. In those acts, congressional assumptions and intent as to taxation of non-Indians on Indian reservations are very clear indeed: no immunity exists.

(iv) **Treaty Provisions Reserving Indian Reservations for the "Exclusive" Use and Occupancy of an Indian Tribe do not, in and of themselves, Preempt State Taxation of non-Indians Purchasing Cigarettes from Reservation Retailers.**

Finally, the United States and the Yakima Tribe argue that Article II of the Treaty with the Yakimas, 12 Stat. 951 (1855) (St. Br. App. 3a), which reserved the Yakima Indian Reservation for the "exclusive" use and occupancy of the Yakima Tribe, ousts the State of jurisdiction to impose taxes upon non-Indians purchasing cigarettes from tribal retailers on trust or restricted status land within the reservation. In effect, the Yakima Tribe and the United States argue that the Tribe may invite non-Indian customers onto the reservation for purposes of buying cigarettes but it has the power simultaneously to exclude the state tax collector from following those non-Indians onto the reservation for the purposes of collecting taxes from them. This startling claim is unpersuasive.

First, it has long been the rule that a non-Indian is not lost from state jurisdiction, including state taxing jurisdiction, when going upon an Indian reservation. *Thomas v. Gay*, 169 U.S. 264 (1898). Second, the treaty involved in *Moe*, the Treaty of Hell Gate, 12 Stat. 975 (1859) contains the identical "exclusive" use and occupancy language. If that treaty was not sufficient to preclude state taxation of non-Indians purchasing cigarettes from tribal retailers on trust or restricted status land (and it was not), there is no reason to expect that the treaty here involved would be sufficient. Therefore, the arguments based upon the Treaty with the Yakimas should be rejected.

Finally, in somewhat the same vein, in *Yakima* the United States and the Tribe also rely (U.S. Br. 30 and Yakima Br. 15) upon the disclaimer clause contained in the Enabling Act for Washington (25 Stat. 696, ch. 180) (St. Br. App. 5a) and in Article XXVI of the state constitution (St. Br. App. 18a). *Cf., Washington v. Yakima Indian Nation*, ___ U.S. ___, 58 L.Ed.2d 740 (1979). The argument, in essence, is that the disclaimer clause erects a legal wall around the reservation, or at least around reservation trust land, immunizing from state law all transactions between Indians and non-Indians. That argument, however, cannot withstand this Court's decision in *Moe*; for Montana, which became a state under the same Enabling Act as Washington, thus has the same disclaimer clause in its constitution. *See Draper v. United States*, 164 U.S. 240 (1896).

Summary:

The arguments advanced by the appellees in support of the decision below are thus ultimately without merit. There is nothing in the history of this Court's decisions in the area of Indian affairs which suggests that an Indian tribe, merely by the enactment of a taxing ordinance, has the power thereby to oust a state of the power to tax its non-Indian citizens with respect to the use or consumption of cigarettes purchased from tribal retailers. If there is to be a tax immunity for non-Indians, we respectfully suggest that it is a policy decision to be made by Congress.

4. **Motor Vehicle Excise Tax Question.**

Lastly, we will here briefly address the argument of the tribes in *Colville* as to the enforceability of all Washington motor vehicle excise taxes with respect to Indian-owned vehicles used both on and off their reservations.

Stripped to its essentials, their argument is this: the Washington tax on motor vehicles, like the property tax on motor vehicles in *Moe*, is measured by the value of those

vehicles. Moreover, as in *Moe*, those vehicles are used both on and off the reservation. And that, according to the Tribes, is the end of the matter; under *Moe*, the Washington taxes are invalid. (Colville Br. 124-26).

This argument by the Tribes fails to consider at all the absolutely critical factor — *where the legal incidence of the tax takes place.* As we have shown at length (St. Br. 111-16), the incidence or tax event in *Moe* took place on the reservation, and only there. Under Washington law, however, the incidence of the motor vehicle excise tax takes place *wherever the vehicle is used,* be it on or off the reservation. And under *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), off-reservation use can be taxed, even though under *Moe,* on-reservation use cannot. Our submission is that short and simple.

CONCLUSION

Ultimately, the appellees' arguments in support of the decision below are unpersuasive. Appellees have simply not demonstrated that an Indian Tribe has the power to oust the State of its power to tax non-Indian citizens purchasing cigarettes from reservation retailers.

The Indian Commerce Clause, of its own force and effect, provides no exemption for these non-Indians. Congressional legislation likewise provides no such exemption. Indeed, Congress has consistently assumed that states do have such power.

There is nothing in the State's tax which interferes with tribal self-government or conflicts with federal legislation governing the affairs of reservation Indians. Accordingly, this case is on all fours with *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976).

This Court should reverse the decision of the district court and hold that the State may require the Tribes and their retailers to collect the State's cigarette and sales taxes imposed upon non-members of the Tribe in the manner prescribed by state law. Furthermore, the Court

should hold that the State may impose its motor vehicle excise tax upon reservation Indians driving motor vehicles outside the boundaries of Indian Reservations.

DATED this 3rd day of October, 1979.

Respectfully submitted,

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